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**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY L. COOK,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee.

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No. 68A05-0604-CR-204

APPEAL FROM THE RANDOLPH SUPERIOR COURT

The Honorable Peter D. Haviza, Judge

Cause No. 68D01-0512-FB-0815

April 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant, Jeffrey Cook, was convicted of Burglary as a Class B felony and Theft as a Class D felony. Cook was also adjudicated a habitual offender and was ordered to serve an aggregate, executed sentence of thirty years. Upon appeal, Cook presents one issue for our review: whether the trial court erred in denying his motion for a mistrial.

We affirm the convictions but remand for correction of a sentencing error.

The facts most favorable to the convictions reveal that Cook planned to burglarize a home to “make some money.” Transcript at 86. On December 5, 2005, Cook and Jennifer Schumacher drove to the home of Kerry and Tammy Rhoades in Schumacher’s pick-up truck, arriving sometime before 1:00 p.m. Schumacher knew Mr. and Mrs. Rhoades because a year previously she had dated their son, Jesse Rhoades. Upon arriving at the Rhoades’ home, Schumacher got out of the truck and went and knocked on the front door to see if anyone was home. When no one came to the door, Schumacher returned to the truck and informed Cook that no one was home. Cook then got out of the truck and went around the side of the house. Schumacher was able to tell Cook where certain items could be found within the residence because she frequently stayed there while dating Jesse. When Cook came out of the Rhoades’ home, he was carrying a bag with jewelry and a box containing money. Cook and Schumacher drove off and returned to Schumacher’s father’s home, where the two had been living. Cook told Schumacher that he was going to use the money and items taken from the Rhoades’ residence to obtain drugs for both of them.

On the morning of December 5, 2005, Tammy Rhoades secured the home because she was the last one to leave for work around 7:50 a.m. At approximately 3:30 p.m. that afternoon, the fiancé of the Rhoades' daughter arrived at the Rhoades' home and noticed that the back door was open. Kerry and Tammy Rhoades were each notified and returned home around 4:30 p.m. to discover that the back door to the residence appeared to have been kicked in and that the master bedroom had been "ransacked." Transcript at 28. Upon further investigation, it was discovered that several personal items, jewelry, and money were missing. Upon cross-examination, Kerry Rhoades testified that their residence had been broken into five days prior to the December 5 burglary and that the six guns taken at that time were never recovered.

Detective Steve McCord learned that Schumacher had information relating to the December 5 burglary of the Rhoades' residence. On December 9, 2005, Detective McCord located Schumacher, and, after being advised of her rights, Schumacher admitted that she knew that Cook planned to burglarize the Rhoades' residence.

On December 20, 2005, the State charged Cook with burglary as a Class B felony and theft as a Class D felony. The State subsequently filed an information alleging Cook to be a habitual offender. On February 17, 2006, Cook filed several motions in limine, one of which sought to exclude, pursuant to Indiana Rule of Evidence 404(b), evidence of other misconduct by Cook. The trial court granted Cook's motion with regard to evidence of other misconduct. A jury trial commenced on February 27, 2006. During the State's direct examination of Schumacher, she testified that on the day in question, she saw Cook exit the Rhoades' house with "[g]uns." Transcript at 87. This reference was a

misstatement of the events of December 5 and was an apparent reference to the theft of guns which had taken place several days earlier. Transcript at 87. Cook objected and moved for a mistrial asserting a violation of the motion in limine prohibiting any mention of other misconduct by Cook. The trial court denied the motion for mistrial, but instructed the jury to disregard the challenged testimony of the witness. The trial continued, and at the conclusion of the evidence, the jury found Cook guilty of burglary and theft. Cook then admitted to the habitual offender allegation.

Upon appeal, Cook argues that the trial court erred in denying his motion for a mistrial. Cook maintains that Schumacher's reference to seeing him exit the Rhoades' home with "guns" was a violation of the order in limine prohibiting any mention of other misconduct and that the admission of such was highly prejudicial and denied him a fair trial. Cook asserts that the court's admonishment was not sufficient to overcome the prejudice.

Upon review of the denial of a motion for a mistrial, we have observed that:

"A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation. A trial court's determination whether to grant a mistrial is afforded great deference, as it is in the best position to gauge the circumstances and probable impact upon the jury. In order to prevail on appeal from the denial of a motion for mistrial, a defendant must establish that the questioned information or event was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. The gravity of the peril is determined by the probable and persuasive effect on the jury's decision. Moreover, reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings." Burks v. State, 838 N.E.2d 510, 519-20 (Ind. Ct. App. 2005) (citations and internal quotations omitted), trans. denied.

The State, during its direct-examination of Schumacher, inquired about the events of December 5, 2005, but received an unexpected response from Schumacher:

“Q And you traveled [to the Rhoades’ home] on December the 5th of 2005?

A Yes.

Q Do you know when you arrived, what time?

A Before one o’clock.

Q I’m sorry.

A Before one o’clock.

Q When you arrived what happened?

A I got out of the truck and knocked on the door to see if anybody was home.

* * *

Q What happened next?

A [Cook] got out of the truck and I got in the truck and [Cook] went to, through, the front was unlocked and he went inside.

Q All right. What happened next?

A He came out.

Q What did you see?

A Guns.

Q I’m sorry.

A Guns.” Transcript at 87.

At this point, Cook’s counsel asked to approach the bench, moved to dismiss, or “for at least a mistrial,” asserting that the Schumacher’s response was a reference to an uncharged criminal act. Transcript at 89. The trial court denied Cook’s motion for a mistrial, and, upon the court’s own volition, admonished the jury to disregard Schumacher’s last response.

After reviewing the record, we cannot say that Schumacher’s testimony that she saw Cook leave the Rhoades’ home with guns was so prejudicial so as to have placed Cook in a position of grave peril to which he should not have been subjected. The witness’s mention of seeing Cook with guns was brief and was followed by the trial

court's admonishment that it should be disregarded. We agree with the trial court's inferential assessment that the challenged testimony would have little persuasive effect upon the jury's decision. This is especially true in light of the overwhelming evidence of Cook's guilt. There was testimony that Schumacher and Cook went to the Rhoades' home, that Schumacher verified that no one was home and shared that information with Cook, that Cook gained entry into the home by kicking in the back door, and that finally, Cook came out with a bag of jewelry, other personal items, and a box of money. Schumacher further explained that she was familiar with the Rhoades' residence and that she was able to tell Cook where he could find certain items within the home. In light of this evidence, the brief reference to "guns" can safely be relegated to the status of harmless error. See Burks, 838 N.E.2d at 520 (holding that a mistrial was not warranted where a witness's reference to a shooting unrelated to the offense at issue was sufficiently minor so as to constitute harmless error).

We note *sua sponte* that in sentencing Cook, the trial court listed the sentences for each conviction and the sentence for the habitual offender determination and ordered the habitual offender sentence to run "consecutive with Counts 1 and 2." Appendix at 10. The trial court did not specify which underlying felony conviction the habitual offender sentence served to enhance as it is required to do. See McIntire v. State, 717 N.E.2d 96, 102 (Ind. 1999). Indeed, it appears that the habitual offender determination was treated as a separate conviction and the sentence thereon was to run consecutive to the other sentences imposed. This is inappropriate. A finding that a defendant is a habitual offender allows the trial court to enhance the sentence of the underlying felony. St.

Mociers v. State, 459 N.E.2d 26, 29 (Ind. 1984). The statute does not set forth an offense in and of itself, since such would invoke the prohibition against double jeopardy. Id. The trial court is directed to correct this error.

The judgment of the trial court is affirmed, but we remand with instructions to correct the sentencing error.

SHARPNACK, J., and CRONE, J., concur.